MOTION FILED SEP 9 1958

IN THE SUPREME COURT

of the

UNITED STATES OF AMERICA

SPECIAL TERM, 1958

No. 1

AARON, et al,

vs

Cooper, et al

MOTION TO FILE

BRIEF OF AMICUS CURIAE

THE PEOPLE OF THE UNITED STATES

To the Honorable the Judges of Said Court:

Proponents move this Honorable Court for leave to file Brief of Amicus Curiae for reasons stated in the STATEMENT to the brief.

Respectfully submitted,

James M. Burke
801 Beech Field Ave.
Baltimore, 29, Md.
For himself, and in behalf of and as next friend of the people of the United States of America.

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INDEX

	Page
Statement	1
Questions Involved	1
Argument	1
Conclusion	8

TABLE OF CASES

West Virginia State Board of Education vs Barnette, 319 U.S. 624 ---------- 7

Kansas vs Colorado, 306 U.S. 46 ---------- 7

STATEMENT

James M. Burke, for himself and in behalf of others, including all of the people of the United States of America, has litigation pending before this Honorable Court pertaining to the subject controversy entitling him to file this brief as amicus curiae, in no wise implying that he joins the people in this controversy.

QUESTIONS INVOLVED

There are two questions promulgated by the Court, that go to the heart of the controversy; these are, in essence:

1. Can we defer a program of this kind merely because there are elements in the community that would commit violence to prevent it from going into effect?

2. Why aren't the two decisions of this Court the national policy?

ARGUMENT

1. "But can we defer a program (plan) of this kind merely because there are those elements in the community that would commit violence to prevent it from going into effect?"

Warren, C. J.

We submit that the question connotes danger of the gravest sort. Hear Edmund Burke in his address before parliament on conciliation with America:

"If then, Sir, it seems almost desperate to think of any alternative course, for changing the moral causes (and not quite easy to remove the natural) which produce prejudices irreconcileable to the late exercise of our authority; but

that the spirit infallibly will continue, and continuing will produce such effects as now ambarrass us, the second mode under consideration is, to prosecute that spirit in its overt acts as criminal.

"At this proposition I must pause a moment. The thing seems a great deal too big for my ideas of jurisprudence. It should seem, to my way of conceiving such matters, that there is a very wide difference in reason and policy between the mode of proceding on the irregular conduct of scattered individuals, or even of bands of men, who disturb order within the state, and the civil dissensions which may from time to time, on great questions agitate the several communities which compose a great empire. It looks to me to be narrow and pedantic, to apply the ordinary ideas of criminal justice to this great public contest. I do not know the method of drawing up an indictment against a whole people. I cannot insult and ridicule the feelings of millions of my fellow creatures, as Sir Edward Coke insulted one excellent individual (Sir Walter Raleigh) at the bar. I am not ripe to pass sentence on the gravest public bodies, intrusted with magistracies of great authority and dignity, and charged with the safety of their fellow-citizens, upon the very same title that I am. I really think, that for wise men this is not judicious; for sober men not decent; for minds tinctured with humanity not mild and merciful.

"Perhaps, Sir, I am mistaken in my idea of an empire, as distinguished from a single state or kingdom. But my idea of it is this, that an empire is the aggregate of many states under one common head; whether this head be a monarch or a presiding republic. It does, in such constitutions, frequently happen (and nothing but the dismal, cold, dead

uniformity of servitude can prevent its happening) that the subordinate parts have many local privileges and immunities. Between these privileges and the supreme common authority the line may be extremely nice. Of course disputes, often too very bitter disputes, and much ill blood will arise. But though every privilege is an exemption (in the case) from the ordinary exercise of the supreme authority it is no denial of it. The claim of a privilege seems rather, ex vi termini, to imply a superior power. For to talk of the privileges of a state or of a person, who has no superior, is hardly any better than speaking nonsense. Now, in such unfortunate quarrels, among the component parts of a great political union of communities, I can scarcely conceive anything more completely imprudent than for the head of the empire to insist, that, if any privilege is pleaded against his will, or his acts, that his whole authority is denied; instantly to proclaim rebellion, to beat to arms, and to put the offending provinces under the ban. Will not this, Sir, very soon teach the provinces to make no distinctions on their part? Will it not teach them that the government, against which a claim of liberty is tantamount to high treason, is a government to which submission is equivalent to slavery? It may not always be quite convenient to impress dependent communities with such an idea.

"We are indeed, in all disputes with the colonies, by the necessity of things, the judge. It is true, Sir. But I confess, that the character of judge in my own cause, is a thing that frightens me. Instead of filling me with pride, I am exceedingly humbled by it. I cannot proceed with a stern, assured, judicial confidence, until I find myself in something more like a judicial character. I must have these hesitations as long as I am compelled to recollect, that, in

my little reading upon such contests as these, the sense of mankind has, at least as often decided against the superior as the subordinate power. Sir, let me add too, that the opinion of my having some abstract right to my favor would not put me much at my ease in passing sentence; unless I could be sure, that there were no rights which in their exercise under certain circumstances, were not the most odious of all wrongs, and the most vexatious of all injustice. Sir, these considerations have great weight with me, when I find things so circumstanced, that I see the same party, at once a civil litigent against me in point of right, and a culprit before me; whilst I sit as criminal judge, on acts of his, whose moral quality is to be decided upon the merits of that very litigation. Men are every now and then, put, by the complexity of human affairs, into strange situations; but justice is the same, let the judge be in what situation he will.

* * * *

"In this situation, let us seriously and cooly ponder. What is it we have got by all our menaces, which have been many and ferocious? What advantage have we derived from the penal laws we have passed, and which, for the time, have been severe and numerous? What advances have we made towards an object, by the sending of a force, which by land and sea, is no contemptible strength? Has the disorder abated? Nothing less. When I see things in this situation, after such confident hopes, bold promises, and active exertions, I cannot, for my life, avoid a suspicion, that the plan itself is not correctly right."

2. "Why aren't the two decisions of this Court, the first one which laid down as a constitutional requirement that this Court unanomiously felt compelled to agree upon,

and the second opinion, recognizing that this was a change of what had been supposed to be the provision of the Constitution, and recognizing that and the kind of life that had been built under the contrary conception, said, as equity has also said, you must make appropriate accommodation to the specific circumstances of the situation instead of having a procrustean bed where everybody's legs are cut off or stretched to fit the length of the bed - and who is better to decide that than the local United States judges - why isn't that a national policy?

"Why hasn't that national policy, why wasn't that enforced in Little Rock, in the Little Rock district when the school board submitted a plan after mature consideration, after enlisting public support in its behalf, submitted it to the Court where it was contested and the Court said, 'yes, this satisfies the policies laid down in the second Brown decision?'

"Why there, that deference to the local situation in the enforcement of what was laid down as a national policy? National policy doesn't mean the same thing must take place in Little Rock, Ark., as in Pittsfield, Mass. For some things yes, but not for this kind of thing. There was a national policy and the federal courts recognized it. It was sustained by the district court over the opposition of the parents or whoever acted in behalf of these children, went before the court of appeals and the court of appeals said, 'Yes, this is a fair carrying out of that which the Supreme Court laid down.'

"I do not understand what is meant by saying, 'Let's wait until we get a national policy,' if that isn't a national policy."

Frankfurter, J.

We respectfully submit to this Honorable Court that the Court is confused as to this question, and that its confusion stems from the argument of counsel before this Court at the hearings preceding the second Brown decision, and that the arguments made in respect to the Equity powers of this Court constitute a fraud, not only upon the people, who were not represented in the formulation of this so-called national policy, but upon the Court as well.

Look to the briefs filed in compliance with the invitation of Court at that hearing. They reek with identical citations of cases, decided in Equity by this Honorable Court, yet not one of which relates to a similar circumstance such as the controversy we have here. For example, in the Amicus Curiae brief of the Attorney General of Maryland at page 8 we find:

In the words of the Solicitor General of the United States, in an address before the Judicial Conference of the Fourth Circuit, on June 29, 1954:

"In our system the Supreme Court is not merely the adjudicator of controversies, but in the process of adjudication it is in many instances the final formulator of national policy. It should therefore occasion no wonder, if the Court seeks the appropriate time to consider and decide important questions, just as Congress or any other policy-making body might -----. In the decision of great constitutional questions, especially those which are in the realm of political controversy, timing can be of supreme importance."

We put it to the Court, from whence does this alleged national policy derive?

From the 14th Amendment to that Constitution? We think not, for therein is prescribed who has the power to enforce that amendment.

What then? From Equity? We think not. A unanimous opinion of this court said:

"If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

W. Va. State Bd. of Ed.
vs Barnette
319 U.S. 624
187 L.Ed. 1628 (1943)

Jackson, J.

What then? From prior decisions of this court? We think not and cite another unanimous opinion of this Court:

"The proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers that Congress has, is in direct conflict with the doctrine that this government is one of enumerated powers. That this is such a government clearly appears from the Constitution, for otherwise it would be an instrument granting certain specified things made to operate so as to grant other and distinct things. This natural construction of the original body of the Constitution is made certain by the Tenth Amendment which was seemingly adopted with the premonition of just such a contention."

Kansas vs Colorado
306 U.S. 46
51 L.Ed. 956 (1907)

From fraud and mistake? Certainly it was fraud if the Solicitor General was speaking literally when in 1955, subsequent to the Brown case, he stated in an address before the Zionist organization: "When we win, we must be sure that we have won fairly." Certainly it was a mistake if the Court relied on the Amicus Curiae brief of the Attorney General of

Maryland relative to the Courts powers in Equity proceedings. Certainly it was both fraud and mistake if the Government, in its haste to implement this alleged national policy moved a judge from another district so fast that he forgot to take the oath of office at the station to which he was assigned, as did the judge who implemented it.

Hear again the words of Edmund Burke: "None of us would not risk his life rather than fall under a government purely arbitrary. But, although there are some amongst us who think our Constitution wants many improvements to make it a complete system of liberty, perhaps none who are of that opinion would think it right tc aim at such improvement by disturbing his country and risking everything that is dear to him -- Aristotle, the great master of reasoning, cautions us, and with great weight and propriety, against this species of delusive geometrical accuracy in moral arguments as the most fallacious of all sophistry."

CONLUSION

We respectfully urge this Honorable Court that, without deciding the issues in this case, Equity could, and should, stay further proceedings for a period of two and one-half years, retaining jurisdiction of the controversy in this Court pending further hearings in the premises.

Respectfully submitted,

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